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## A CASE OF IDENTITY

WILLIAM RENWICK RIDDELL<sup>1</sup>

The most extraordinary criminal case in many respects in Upper Canada was that of a person charged with crimes committed by William Townsend.<sup>2</sup>

William Townsend was born near Fort Porter, now Black Rock, in the State of New York in 1828. His father Robert Townsend was of good stock, being descended from Sir Roger Townsend,<sup>3</sup> who landed at Plymouth in 1530. Robert, born in Massachusetts, came with his brothers to Buffalo during the war of 1812; he was a carpenter and shipwright and enjoyed an excellent reputation all his life. He married Mary Ann Wright, the widow of an American soldier who had been killed during the war along with her brother William Caskey at Fort Porter. The Caskeys were descendents of Joseph Caskey, a Church of England missionary, whose church was burned by the Indians; he escaped, to live a missionary for over fifty years.

Robert Townsend bought land near Fort Porter and there three of his children were born, William being the eldest. Then he crossed the international line and worked on the Welland Canal, taking part in building the docks at Port Dalhousie. Afterwards he bought land known later as the "May Farm," some two miles from Port Dalhousie, and built a house on it in which he lived with his family for a time. The frame work of the old Townsend house was still standing a few years ago. Selling out this farm, he bought some wild land between Canboro Village and Canfield, where he lived until his death in 1844.

When about thirteen William joined the government ship "Mohawk" as a helper in the galley, etc. Leaving the service in 1844, he helped on his father's farm near Canfield for two years dur-

<sup>1</sup>Justice of the Supreme Court of Ontario, Toronto, Can.

<sup>2</sup>The facts of this curious case are taken from contemporary newspaper reports of the two trials, the official record at Welland, two contemporary pamphlets containing accounts, an article in the People's Press, published at Welland, January 19, 1915, on the "Townsend Gang," by "The Old Timer," and an answer in the same paper, May 25, 1915, by a "Niece of Bill Townsend," and material derived from private inquiry. I have tested the information and believe what is set out in the present article will be found accurate. The Judge's Notebook is not available; Mr. Justice McLean kept the notes of the civil and the criminal cases in different books and that containing the latter seems to have been lost. *Valde deflendus.*

<sup>3</sup>Sir Roger Townsend seems unknown to the biographers.

ing his father's last illness. On the death of his father in 1846, William joined the government ship "Montreal" as a "second-class boy"; he deserted in 1848, but rejoined the "Mohawk" in 1849, remained but three months and then again deserted when in Cleveland, because he had been ordered to paint the ship's bottom with red ochre. He had been entered in the ship's books as William Townsend, but was always known by the name "Little Davy Crockett"; his conduct is said to have been good while in the service.

After leaving the government employ, he worked on the farm, sailed a little, worked in saw mills, as a cooper, etc. He was not a good workman, but rather a jack-of-all-trades. He was also for a time a cab driver in Hamilton, drove the stage from Hamilton to Cayuga, and did some trading on the Welland Canal, but had no steady employment.

He was an apt mimic and could imitate many dialects: his great delight was to play the violin or tambourine and bones, to black up and sing and dance as a "Nigger Minstrel." He formed a Nigger Minstrel Troupe and gave concerts round the country. These seem to have pleased the people, as one lady swore she attended eleven of the entertainments; probably the art was not of a high grade, however. He does not seem to have fallen a victim to the then national vice of drunkenness,<sup>4</sup> but in other respects he became depraved. With others he formed a gang of pickpockets and thieves operating in Hamilton and around Canfield; of this gang it is probable he was not the leading spirit; that place seems to have been held by one Lettice, an Englishman, who came to the Townsend place under the name of Anderson; there were also persons of the names of King, Blowes, Bryson, Patterson and Weaver, who seem to have made up the number of members.

While many depredations were committed, blood was not, so far as known, shed by the gang until October, 1854.<sup>5</sup> On the Talbot Road, a few miles west of Cayuga, lived at Nelles' Corners, John Hamilton Nelles, a member of one of the most respectable families of Upper

<sup>4</sup>The "Niece of Bill Townsend" says, "Townsend's troubles commenced when he started going to a hotel in Cayuga—just as all young men do when they start drinking that awful curse whisky"—and she adds that on the night of Nelles' murder, "Townsend had been drinking," "Townsend's whiskey was talking"; but at the trials some who knew him well testified that he did not drink.

<sup>5</sup>After the murder of Nelles and Richards there arose memories of many other murders supposed to have been committed by the "Townsend Gang" or the "Notorious Bill Townsend." Bryson "the Queen's Evidence" swore at the first trial that Townsend told him that he had shot five men once in one house, "for dead men tell no tales"; but no other homicide than those of Nelles and Richards has ever been traced to him or his gang.

Canada and himself of high standing in the community. A knock came at the door in the night of October 18, 1854; Nelles first opened the door and then closed it; it was pushed open and five men entered. One said, "You are the scoundrel who shut the door in my face" and immediately shot Nelles.<sup>6</sup> The robbers then took what money there was, also a gold watch; and opened a trunk in search for valuables. Nelles died in a few hours.

The gang fled; (they had committed several robberies on the same day). Blowes was caught in Hamilton in the house of one Mrs. Mary Ann Arno or Arnold, otherwise known as Limping Jenny, a lady whose reputation limped worse than her name; King was captured at his father's farm near Barrie, about 70 miles north of Toronto; Lettice was shot and killed by a constable on Squaw Island,<sup>7</sup> when attempting to escape, and Bryson was taken in Hamilton.

Bryson, King and Blowes were tried at Cayuga for murder, and convicted; King and Blowes were hanged, while Bryson's sentence was commuted to imprisonment in the penitentiary for life. (See Note 12 post.)

Townsend first went home, then went to St. Catharines and probably to Buffalo and later concealed himself for a time at the house of his brother-in-law John Horn; at length on November 2nd he came out of hiding and made a break for freedom. Going with a man, who was afterwards identified as Lettice, toward Port Robinson they met Jacob Gainer, who had sold a load of wheat there, and robbed him of his money, Townsend telling him that he had shot a man at Nelles' Corners and needed the money to get out of the country. The two fugitives went on to Port Robinson and had dinner at the Jordan House. Gainer laid an information before Mr. James McCoppen, J. P.; he called Charles Richards a constable who went at once to the Jordan House, followed by McCoppen. Asking

<sup>6</sup>It is possible that the person who actually shot Nelles was Lettice (or Anderson), but the evidence points directly to Townsend; that Townsend killed Richards there never was any doubt.

<sup>7</sup>Lettice (as will appear below) went with Townsend when he made a break for freedom. The constables searching for Townsend along the Canadian border at Fort Erie, Bridgeburg, etc., heard that a man had been seen on the river bank. They took a small boat and rowed over to Squaw Island to see if he had gone there. They found a young man on the island, who ran from them; he refused to stop when called on to do so, and climbed upon a barn where he was shot by the pursuing constables. He was positively recognized as Lettice, but there always has been a doubt. One story is that Lettice died some years after in Chicago, having assumed the name of Townsend before his death. He is said to have stated that his real name was Anderson, that he had shot a man near Welland, and had robbed many stores in Ontario, etc. Such stories are not infrequent: it is not worth while here to discuss the truth of this.

Mr. Jordan if there were any strangers in the house, he was informed of the two who were there. When one of them came out of the bar, McCoppen entered into conversation with him and Richard, recognizing him as Townsend, laid his hand on him; Townsend turned around and said, "Let go of me or you are a dead man." Richard retained his hold and Townsend shot him dead and made his escape. A large reward was offered for the arrest of the criminals, including Townsend.

His immediately subsequent movements are not known; but a day or two thereafter he boarded a train on the Great Western Railway from Hamilton to Windsor. This fact was telegraphed along the line; and at Woodstock the sheriff and the gaoler with four assistants went on the train and found him. By most consummate assurance he lulled their suspicions, said he knew they took him for Townsend, but that he was a traveller from east of Rochester going west. He came upon the platform, talking easily and with a smile, and "jollied" them along until the train had acquired a good rate of speed; then he "darted away like a deer and leaped on the last platform of the last car." By almost incredible stupidity and ineptitude, the Woodstock authorities did not telegraph what had happened.

He was, it is believed, seen by an old schoolmate, George May, in Chicago, coming off the cars in the "fall of 1854." He asked May not to call him Townsend, giving a name with a "Mac" in it, and said he was on his way to New Orleans and from there to Australia or California. No information of this, however, came to the authorities till long afterwards.

The next heard of him was in August, 1855, when the sheriff at Rock Island, Illinois, thought he found him in the person of an actor in one of the "side shows" of Stone and Van Amburg's Circus and Menagerie; as he mentioned the fact *in confidence* to the proprietor of the show and the proprietor repeated it *in confidence* to the ringmaster, the fact was ultimately repeated *in confidence* to the suspected person, who promptly disappeared before a Canadian officer could arrive. It was believed at the time that he had gone to California by the Overland Route; but this was never verified.

The next act in the drama was played in Ohio. One morning in April, 1857, on the train on the Columbus and Cleveland Railway, leaving Columbus about 1:30 a. m., the conductor Knowlton found a man who had no ticket and no money to pay his fare, \$3.50. He told the conductor he had come from Nicaragua and offered his

Colt's revolver, fully loaded and freshly capped,<sup>8</sup> as a pledge for the amount of his fare. The conductor *faute de mieux* took the pistol; and shortly after the arrival of the train at Cleveland, about 8 a. m., the passenger came to Knowlton's house for his pistol; but, as he had no money, Knowlton refused to give it to him. The man came back again, and Knowlton refusing to go with him to River street ("a rather disreputable place"), where he said he had a friend who would help him to "raise the wind," took him to a hotel kept by John Iles at 110 Erie street. Iles had previously lived in Canada and knew Townsend well. He was washing some tumblers when the conductor and his passenger came in; and he was so startled at seeing the man whom he took for Townsend that he let one of the glasses fall. Iles told him to go and get his supper, and he himself ran and informed the police. The man was arrested, later identified by witnesses from Canada and extradited.

During his six months' incarceration in the Gaol at Cayuga awaiting the Fall Assizes, he was visited by many of the friends and acquaintances of William Townsend, including his mother (Mrs. David Dewar), his stepfather (David Dewar), his brother-in-law (James B. Smith) and his sisters, Mrs. Smith and Francis Townsend, all persons of respectability. They all insisted that the prisoner was not Townsend. Many of Townsend's old acquaintances on the other hand were equally confident that the prisoner was Townsend; and the countryside was divided into two factions.

The prisoner was very reticent: he said his name was Robert J. McHenry, that he had come from near Glasgow, Scotland, and had

<sup>8</sup>To those who are accustomed to the breach-loading revolver with fixed ammunition it sounds odd to speak of a revolver as being "capped"; but in my early boyhood the revolver was muzzle loaded and had percussion caps.

Fixed or metallic ammunition came into fairly common use in the 60's. I used it myself in the "Remington four shooter" and single barrel as early as 1865, but the Colt revolver was not made for firing such ammunition until after 1870. The first U. S. Army Colt for metallic cartridges (called the 45 caliber Colt Army Revolver) was tested 1871 to 1874 before being adopted by the Army, and in this the chamber of the cylinder had to be loaded with cartridges one by one from the rear. This Colt was very much like the celebrated Colt Frontier, caliber 44, of which many hundred thousand were sold.

The Colt Navy revolver had cap and ball cylinders until the late 70's, when some of them were converted into metallic cartridge weapons. The modern Navy revolver with its cylinder allowing all the empty shells to be ejected in one act and reloading by a loading pack was adopted as late as 1889.

The late adoption of the metallic cartridge for Colt revolvers was due to the patents of Lindner (1854), Rollin White (1855), and Mayall (1860); but Colt made 65,000 Burdan rifles with such ammunition for the Russian government about 1868-1871.

been with Walker<sup>9</sup> in Nicaragua; but he refused to give any further account of himself. He was perfectly confident of acquittal, retained no lawyer and subpoenaed no witnesses.

The Fall Assizes came round; a true bill was found against William Townsend for the murder of John Hamilton Nelles, the prisoner was arraigned under the name of William Townsend, and under that name pleaded Not Guilty, announcing himself ready for his trial without counsel or witnesses. This course astonished the Assize judge, Mr. (afterwards Chief) Justice McLean and the Solicitor General,<sup>10</sup> Henry Smith, who was conducting the prosecution for the Crown. Fortunately for him, Mr. S. B. Freeman, an able and

<sup>9</sup>William Walker, "the last of the Filibusters," was born in Nashville, Tenn., May 8, 1824, of Scottish parentage. He became a doctor, lawyer and journalist, practicing medicine in Nashville and Philadelphia, law and journalism in New Orleans and in 1850 became editor of the San Francisco Herald. He also practiced law in California. In 1853 with a band of some 170 followers he invaded Lower California and Sonora (Mexico), but was driven out by Mexican troops. In 1855 he invaded Nicaragua, Central America, with 56 followers, and in 1856 he was elected president of that so-called republic. Defeated towards the end of the same year by the Legitimists of Nicaragua, assisted by the Costa Ricans, he went to Panama. After two attempts to recover the country, which were rendered futile by the intervention of the United States, largely at the instance of Vanderbilt, he ultimately in August, 1860, again invaded Nicaragua. Captured in September by Captain Salmon of the British warship *Icarus* he was delivered to the authorities of Nicaragua, tried by court martial and shot at Trujillo, September 12, 1860. His own work, "The War in Nicaragua," published in 1860, must be read with caution, but a very full and satisfactory account is given of this last and greatest of American filibusters in "The Story of the Filibusters," by James Jeffrey Roche, London, T. Fisher Unwin, 1891.

Assuming that the prisoner was the McHenry of Chips' Flats, California, as sworn at the second trial, it was not impossible that he had been with Walker in Nicaragua. The last account we have of McHenry at Chips' Flats is in October, 1854; Walker sailed from San Francisco for Nicaragua with the "Immortal Fifty-six" in the brig *Vesta*, May 5, 1855; and while it was not till May, 1857, that he left Nicaragua, some of his soldiers had already gone home disheartened with the failing fortunes of their leader.

But there were hundreds, even thousands, who claimed to have been "with Walker in Nicaragua," who had never seen him; many accounted in that way for an otherwise unexplainable absence from the view of their friends and there have been since that time as many "last survivors" of Walker's Expedition as of the "Light Brigade" of Balaclava fame.

<sup>10</sup>In the early times of the province the law officers of the crown, i. e., the attorney general and the solicitor general claimed the right to conduct all prosecutions for the crown and (incidentally) received the rather substantial fees for such services. But as the province became better settled and the number of courts increased, it was found necessary to retain other counsel; and gradually the law officers began to omit to conduct prosecutions. By the time of those trials it was unusual for either attorney general or solicitor general to take the crown briefs except in very important cases—the solicitor general in opening said: "The present inquiry is a most important one, so much so that the government have thought fit to request me to attend to conduct the case, although I am not in the habit of going the circuit." (Smith lived in Kingston.) There has been no instance for many years of a law officer of the crown taking a criminal prosecution—certainly none in my time, thirty-five years.

brilliant barrister of Hamilton, was attending the Assizes. After the arraignment, when the prisoner had been remanded for trial on the following day, a number of those interested in him spoke to Mr. Freeman; and he voluntarily undertook the duty of conducting the defense, associating with him Mr. Start, also of Hamilton, a barrister of good standing and great ability.

There was no difficulty in proving that Townsend had been present at the murder of Nelles and if not the actual perpetrator of the deed, was aiding and abetting; the sole defense was that the prisoner was not Townsend.

The prisoner was a man of about 5 feet 7 inches in height; his complexion was somewhat pale; his cheeks were thin, his face was elongated, but cheerful, his eyes large and of a peculiar light blue, his hair dark brown, and eyebrows of a lighter tint, not meeting over the nose, but well arched, his forehead large, heavy and somewhat high, his nose large, thick at the top and rather bent from the bridge downward. He had a scar above his left eyebrow about an inch long and inclining toward the temple, and another of the same size on his under lip; his chin was long and prominent, his cheekbones rather high and from the left cheek bone there was a large broad scar nearly three inches long and extending downwards. All witnesses agreed that he was thinner and paler than Townsend.

There was little difficulty in obtaining a jury, the Crown did not challenge, and the defense challenged only those who had expressed opinions and few from certain neighborhoods. (In an experience of thirty-five years I have never known it took more than half an hour to procure a jury in a murder case in this province.)<sup>11</sup>

Bryson, who turned "Queen's evidence"<sup>12</sup> and who was brought from the Kingston penitentiary, identified the prisoner most posi-

<sup>11</sup>There is nothing which more amazes an Ontario barrister in the practice of some of the courts of the United States than the extraordinary length of time taken in procuring a jury; we, a busy and poor people, could never afford the time. Every prisoner is allowed to have a copy of the jury panel four days before the sitting of the court, and is expected to have his objections ready; while we do not allow the examination of jurymen by counsel on either side.

<sup>12</sup>When Bryson was arrested he made a full confession; he was tried, convicted and sentenced to death at the same assizes as Blowes and King (his confession was not used against him). His youth aroused sympathy, and petitions were presented to the governor general by William Lyon MacKenzie, M. P. P. (the well-known rebel of 1837), Joseph Curran Morrison, M. P. P. (afterwards Mr. Justice Morrison), and many others; and apparently influenced by his youth and his frank and full confession, Bryson's sentence was, May 3, 1855, commuted to imprisonment for life.

While he was not called as a witness against King and Blowes, he was



tively, but gave the important evidence that Townsend wore earrings the nine months he knew him, that he wore them when he shot Nelles and took them out at Buffalo at the United States Hotel—there were no holes in the prisoner's ears or any indication that there ever had been. Another convict was equally positive, as were eighteen other witnesses, nearly all of whom had known Townsend well, including the captain of his Militia Company; and six thought him to be Townsend, but would not swear to the identity. This evidence took up the first day and part of the second, September 24 and 25, 1857.

During the first day the prisoner was allowed to wear his beard; but the Crown prosecutor ordered him to be shaved before the second day's proceedings began; at first the prisoner objected to this, but finally yielded with good grace.

The evidence of identity on the first day was general, but the second witness (Wait) on the second day deposed that Townsend had a scar from the joint of the large toe of the right foot to the ball of the foot; the prisoner's boot being removed, a scar, much such as had been described but a little smaller, was manifest. That Townsend had such a scar was sworn to by another witness who said it had been caused by a cooper's adze. The next witness (Brooks) described a scar above the left eyebrow of Townsend and pointed out to the jury a similar scar on the prisoner; the next witness corroborated this, as did four others. That Townsend had a scar on the lower lip like the prisoner was sworn to by only one witness—and 'he seems to have been unreliable; that he had a scar on the left cheek was deposed to by four persons, one saying that it had been caused by a burn; one witness had never seen such a scar on Townsend's face and another was not sure. Thirty-two witnesses were called for the Crown in all.

For the defense forty-nine witnesses were called, most of whom knew Townsend well and all of whom swore the prisoner was not he—Townsend's mother, step-father, brother-in-law and two sisters were amongst those called. All gave general evidence, but many gave reasons for their belief as well. No one seems to have known of the scar on the right foot, but two admitted the scar over Townsend's left eye. There was a consensus of opinion that Townsend's eyes were

brought up from Kingston penitentiary as a witness on the two "Townsend" trials.

He identified the prisoner without hesitation or equivocation. He said on his examination that he hoped that he might be pardoned "because I know I did not commit the murder," but "I expect no reward for giving testimony"; he was pardoned June 22, 1868, after serving more than thirteen years. I do not know anything of his subsequent history.

blackier than those of the prisoner, being described as "black," "dark," "hazel," dark gray," "not quite jet black," etc., very different from the prisoner's blue eyes. The witnesses agreed that Townsend's hair was dark, almost black, and straight as an Indian's, while, as one pointed out, the prisoner's hair curled. Townsend's eyebrows were heavy and black, and they nearly met; his face was "short and fat," "square" not long; his forehead was low; his mother, sisters and stepfather testified to the big joints of his feet, different from those of the small and rather dainty feet of the prisoner. Several who had seen him daily for years told of his speaking through his nose or clenched teeth, of his downcast look, his feminine voice and beardless appearance. Several admitted than seen at a particular angle the prisoner looked a "*leetle* like Townsend"; but all were confident that they were not the same. Mrs. Dewar and her two daughters swore to Townsend having the letters W. T. and an anchor on his arm, put on with India ink or powder; and it appeared that the anchor on the wrist was part of the description sent along the line of railway when Townsend was making his escape. Another witness Quick deposed that if the prisoner was Townsend he would have a scar on the left arm an inch and a half long; the prisoner at the request of his counsel bared his arm, and no scar, anchor or letter was to be seen.

Mr. Freeman said he did not think it necessary to address the jury; the Solicitor General took the same course and the trial Judge gave a short and impartial charge, telling the jury that there was really but the one question to decide, "Is the prisoner William Townsend?"

After six and a half hours of consultation the jury announced their inability to agree; one jurymen desired the Judge's opinion, which was of course refused; and the jury were discharged. It was ascertained that the division in the jury was: For conviction 7, for acquittal 4, undecided 1.

The delay in finding a verdict seemed to dismay the prisoner who lost little by little his jaunty and confident air; the failure to agree hit him hard, he thought "it was the d—dest piece of business he ever came accross." The trial judge remanded him to prison till the next Assizes, six months later, informing him, however, that if he could produce satisfactory evidence that he was not Townsend or could show who he really was, he would be admitted to bail—the prisoner declined and spent next day writing letters.

During the interval many efforts were made to induce the prisoner to give some account of himself, and offers were made to him to

collect a fund for his defense; he steadfastly refused, saying that he did not require money, all he had to do was to prove an alibi; to one he spoke of being in communication with his friends, to another "You do not know my family history, there are things which rather than expose I would die on the gallows"—the offers of others he treated with contempt, silent or avowed. He did, however, unburden himself in part to a Scotsman from near Glasgow, Walter Maitland; to him he said he came from Springburn, two miles from Glasgow, and he gave an accurate description of the place, the names of the farmers, etc.—a description which could hardly have been made up, except from personal knowledge of the locality. At the second trial it was attempted by the Crown to explain this knowledge by the fact that Townsend's brother-in-law, John Horn, was a Scotsman; but he came from Dunfermline, not at all near to Glasgow, especially in those days; and the other Scot, the step-father, David Dewar, came from Cupar in Fifeshire and knew nothing of Springburn.

Considerable interest, however, was taken in the case, and a small fund was collected for the payment of witnesses.

A letter written by him at the urgent advice of a Justice of the Peace near Cayuga, in June, 1857, shortly after his incarceration at Cayuga, began to bear fruit; and the effect was manifest at the next trial. This was written to "Mr. J. Anderson, Recording Scribe, Sons of Temperance, California"; and stated that the writer "R. McHenry"<sup>13</sup> had been charged with a crime committed in Canada when he was residing at "Chips' Flats," California—this was published in newspapers far and wide and produced a crop of witnesses for the prisoner.

It was determined to proceed at once against the accused for the murder of Charles Richards at Port Robinson; and as the locus of this crime was in the County of Welland, he was removed from Cayuga Gaol (in the County of Norfolk) to Merrittsville,<sup>14</sup> in the

<sup>13</sup>At the second trial this letter was produced, it detailed the history of McHenry in Cleveland and California, and mentioned a number of books in which McHenry's name was recorded in California. Much was made by the Crown of the difference in name. The prisoner signed "R. McHenry" to the letter, whereas the signature "Robert J. McHenry" appeared on the Sons of Temperance books in California. Mr. McDonald, the Crown counsel, said during the progress of the defense, "he had intended to prove that there had been an R. McHenry in California, and that this man had taken his name and written in his name for the papers, which he never would have got had he written R. J. McHenry." But no attempt at proof of that character was made, although there was much cross-examination as to other persons in California called McHenry.

<sup>14</sup>This, the county town of the County of Welland is now called Welland.

County of Welland. At the Assizes (called on the Criminal side, the Court of Oyer and Terminer and General Goal Delivery)<sup>15</sup> on October 7, 1857, a true bill was found against the prisoner under the name of Robert John McHenry for the murder of Charles Richards; on being arraigned before Chief Justice Draper he pleaded Not Guilty; and on motion of his counsel, Mr. Start, the trial was postponed until the Spring Assizes.

At the Spring Assizes before Mr. Justice McLean, at Merrittsville on March 25, 1858, the bill found at the previous Assizes was quashed on motion of the Crown Counsel; and on the same day a true bill for the murder of Charles Richards was found against "William Townsend, otherwise called Robert John McHenry"; to this indictment the prisoner pleaded Not Guilty and the trial proceeded next day, Friday, at 9 a. m. It lasted Friday 9 a. m. to 10 p. m., Saturday 9 a. m. to 10 p. m., Monday 9 a. m. to 10 p. m., Tuesday 9 a. m. to 4:45 p. m., when the Crown rested, having called 62 witnesses; the defense Tuesday 4:45 p. m. to 9 p. m., Wednesday 9 a. m. to 9:30 p. m., Thursday 9 a. m. to 8 p. m., Friday (Good Friday) 9:30 a. m. to 9 p. m., Saturday 8 a. m. to about noon, when the defense rested, having called 89 witnesses; rebuttal began and continued until 7 p. m., Monday 8 a. m. to 10:15 a. m., having produced 18 more witnesses. The leading counsel for the prisoner, Mr. S. B. Freeman<sup>16</sup> (Mr. James G. Currie was with him), addressed the jury 10:15 a. m. to 2:15 p. m., being followed by leading Counsel for the Crown, Mr. Rolland Macdonald (Mr. Robert Harrison was with him), till 4:55 p. m.; the Judge's charge took till 8 p. m., when the Court rose to resume Tuesday, April 6, at 9 a. m. At 4 p. m. the Jury returned with their verdict, Not Guilty, adding "the prisoner is McHenry."

<sup>15</sup>At that time the trial courts were separate courts from the Court of Queen's Bench and Common Pleas, but were presided over by judges of these courts. On the criminal side the trial courts were Courts of Oyer and Terminer and General Gaol Delivery; on the civil side, Courts of Assize and Nisi Prius. The same judge presided in both and the courts were commonly called "the Assizes"; the judge "the Assize Judge." All these technical distinctions are fully explained by Blackstone in his commentaries: they came to an end in Ontario in 1881 by the operation of the Judicature Act, 44 Vic, c. 5 (Ont.).

<sup>16</sup>Mr. Freeman, who was not only a man of high legal attainments but also of the highest character, told the jury how he came to defend the prisoner on the former trial and said: "He asked the prisoner nothing about his history or circumstances, but contented himself with hearing the evidence. On that occasion he knew no more of the prisoner than what he had learned from the witnesses on the previous occasion, except that he had received certain documents from California which had not been allowed to be put in as evidence." He was referring to a letter from California to the Governor General of Canada from residents of Chips' Flats in California concerning McHenry, which, on objection by counsel for the Crown, was not allowed to be put in—an unexceptionable ruling.

Both parties were better prepared for this trial, having at the previous trial learned the weak points of attack and defense.

Very many of the witnesses on both sides swore generally without adducing reasons for their belief that the prisoner was or was not Townsend; some, however, condescended to particulars and gave reasons.

The first thing to be noticed is that several witnesses for the Crown swore that Townsend had "blue eyes," "large blue eyes," one even saying "light blue eyes." This was opposed by an overwhelming mass of evidence that his eyes were black (one schoolmate said that he was known at school as "Blackeyes"), "dark," "very dark," "dark hazel," "dark brown," etc. So much was the Crown impressed with this evidence that two medical men were called who testified that "persons' eyes might grow lighter or darker so that it is possible for a man to have a dark blue eye one year and a light blue eye four or five years afterwards"; one doctor spoke of a certain child with light blue eyes, when she was grown up having them dark hazel. (this is of course a well known phenomenon, but no one swore that a dark or black eye ever grew to be a blue).

The hair of Townsend was said by many to have been darker than that of the prisoner, but several said it was sandy and lighter—one endeavoured to account for the color apparent by saying it might have been dyed—most of the defense witnesses swore to Townsend's hair being black and straight as an Indian's, and it seems to have been taken for granted and almost admitted that the prisoner's was considerably lighter than Townsend's.

Counsel for the Crown in his address to the jury "threw aside all the testimony as to the color of this man's hair and eyes. One often knew nothing about the color of hair and eyes of one's friends . . . even now it was difficult to say whether the prisoner's hair was black or brown." Mr. Freeman on the contrary triumphantly exclaimed to the jury, "Would this man, the prisoner, ever be called 'Black-eyes?'" No doubt he was wise in dwelling upon this apparent trifle; a little thing like that notoriously has an immense influence with a jury.

The scars came in for considerable attention—that over the left eye seems to have much resembled one borne by Townsend, as did that on the right foot. But the large scar on the left cheek was the subject of much contradiction; at least nine witnesses swore that Townsend had such a scar, while as many swore positively he had

not—these included Townsend's step-father and some of his most intimate friends—and nearly a score had never noticed such a scar as they thought they must have done had it existed. One witness for the Crown swore that the scar was caused by Townsend being kicked by a horse, but he was speedily discredited; the man who was in fact so kicked being called as a witness.

The dramatic episode of the scar on the left arm, which occurred in the first trial was not repeated; the witness David Quick was not called on the second trial at all.<sup>17</sup>

The marking in Indian ink or powder on Townsend's left arm—a mermaid (or anchor)—was again sworn to by several, amongst them certain witnesses called for the Crown; but its absence on the prisoner was discounted by the evidence of two who swore that they had themselves had similar Indian ink marks removed "by putting breast milk on the arm over the mark and then pricking the arm in the same place again"—other similar cases were deposed to; and no point was made of the mark by either Counsel or by the Judge. The defense relied strongly upon the ungainly feet of Townsend; "lumpy," "with the big toe over-riding," "in fact big lumps which showed through a boot." One witness swore, "if that's Bill Townsend he has got new feet on him," another told of getting a pair of boots for him and wearing the new boots for two hours without discomfort, while Townsend could scarcely get them on at all and could not wear them. The prisoner and witness exchanged boots; "that of the prisoner fitted very tight on the witness and that of the witness easily slipped off and on prisoner's foot"; still another spoke of Townsend's foot having "larger lumps than those of mine" (about the size of half an egg)—at the request of a juror the feet were compared and, on this comparison, great difference in size was at once apparent.<sup>18</sup> The fact that Townsend could never write decently and would not read anything but the lightest stuff, while the prisoner spent much of his time in reading or writing was also adduced; as was the want of beard in Townsend and the heavy beard of the prisoner.

<sup>17</sup>No reason appears for the omission to call this witness. The omission of all mention of him or his evidence raises considerable suspicion as to the reliability of his evidence on the former trial.

<sup>18</sup>Dr. Burns had "known lumps on a man's toe joints caused by disease such as gout or by the friction of boots, by the thickening of outside skin; some may be removed." Dr. Brooks said, "the continued use of tight boots might enlarge the toe joints and in some cases, the cause being removed, the enlargement would disappear." But such theories had probably little effect against the ocular demonstration given in court.

It is doubtful whether all these would have secured an acquittal, the defense was not much stronger than at the first trial—it was the *alibi* evidence which turned the scale.

Mr. O. C. McLouth, an attorney of Sandusky, Ohio, testified that the prisoner had been confined under the name of Robert J. McHenry in the Sandusky gaol from July, 1851, to March, 1852, on a charge of assault, which ultimately was not proceeded with—he then represented himself as an American (if this evidence was true, the prisoner could not be Townsend, as he was employed as a cooper by Benjamin Diffin in Canada February, 1852).

Captain Turnbull, a lake captain, swore that the prisoner had worked on his vessel, the "Powhattan," as cook or steward as least from early in October to the middle of December, 1852, under the name of McHenry, that he understood him to have come from Scotland and that he then had the scar on the left cheek—that he left Captain Turnbull to go to California.

Captain Lewis, who had been first mate on the "Powhattan," said that the prisoner under the name of "Robert J. McHenry" had been steward on that vessel from August or September until December 18, 1852, that he said he was a Scotsman. Turnbull testified that in the latter part of 1853 or the beginning of 1854 (Lewis said it was about February, 1854) he received a letter written by McHenry, dated in California, September or October, 1853, in which he gave particulars of the work he was at in California. Lewis corroborated this, but unfortunately the letter had been destroyed.

Then came four witnesses who deposed to having known the prisoner at Chips' Flats,<sup>19</sup> in Sierra County, California, one certainly as early as July, another as early as August and the two others in October, 1854. They all gave circumstantial accounts of their intercourse with him—one (Frank J. Huber) had recommended him to join the Sons of Temperance and frequently saw his signature "Robert J. McHenry," another (John Follinsbee) telling of a lawsuit in which they were both interested. That the prisoner had written from

<sup>19</sup>"Chips' Flats" was named after its discoverer, a ship's carpenter, who was, of course, called by the regular nick-name "Chips"—his real name is not given. Much of the evidence of transactions at "Chips' Flats" reminds one of Bret Harte's stories. The witnesses speak of French Corral, Red Dog (Nevada), Yuba County, Balsam Flats, Foster's Bar, Chips' Diggings; "Scotty" was a well known character; Hugh Aikins was generally known by the name of Walton. "There were very few who then knew me by my proper name." "Bill Henry of Forest City kept an eating house and sold beef"; "spoke quick with a kind of Yankee tone," and "was considered a very nice young man." A Jack Follinsbee had taken part in a law suit with McHenry, but "knew him by the name of Bob and no other name."

Cayuga Gaol to James Anderson, recording scribe Sons of Temperance, California, was certain; and unless all these four men were perjured or mistaken, it was impossible that he could be Townsend.

In the light of the dates the evidence that Townsend had been seen in Chicago, and had then said he was on his way to Australia or California, giving himself at the same time a new name with "Mc" in it—one witness thought it was "McHenry"—ceased to be of importance, particularly when the witness (George May), who saw him there, did not "recognize the prisoner as the man—he must have changed very much."

The perfect coolness of the prisoner was apparent throughout the trial; he would hold a candle up to his face that the witnesses could see him better, pointing out the scar on his cheek, urging them to "Take a good look;" "Take off your goggles, old fellow;" "Be sure, sir, take a good look at me; remember the consequence;" telling them "I come of a long-headed race," asserting to the Crown Counsel "I am open to answer any question you like to ask about Scotland;" and when a witness expressed a fear that he would do him harm and had him searched addressing him condescendingly "Poor fellow, come along."<sup>20</sup>

There were some curious circumstances that were not explained—the prisoner seemed to know Iles, he spoke of having been along the Welland Canal and of knowing the Grand River and London (Upper Canada), he spoke of his stealing a boat off the "Mohawk" and selling it at Dunnville, correcting a person who said it was sold at Cayuga; he said he had seen Blowes and knew something about King and was horrified when he was told they had been hanged; he knew Mr. Jennings of Pelham and told Mr. Hellems (when he said that he and Townsend's father were once working building the piers at Port Dalhousie) "You were driving piles." If he and Townsend were not the same person, it is possible that they met at some time; but that is not a complete explanation.

Upon the acquittal of the prisoner, the Crown entered a *nolle prosequi* on the Cayuga indictment and the prisoner was released.

It is alleged by certain members of the Townsend family that William Townsend shortly after his escape enlisted on a U. S. vessel on Lake Erie and wrote his mother to that effect from Erie, Pa.; that he was informed by his mother of the arrest of the *soi-disant* McHenry and he wrote her to let him know and if they convicted

<sup>20</sup>This was believed to be the longest murder trial ever had in this province. The only ones that at all approach it were the celebrated Sifton trials at London.



him he would come and deliver himself up. Nothing of the kind came out in evidence at the trial.

It is also said that Townsend remained on the U. S. boat until the outbreak of the Civil War, when he again wrote his mother that he had been taken off the war boat and was going into the war.

I have not been able to obtain any account of the subsequent career of McHenry.